Filed 7/16/20 P. v. Phomvilay CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. VONG PHOMVILAY, Defendant and Appellant.	F076279 (Super. Ct. No. 15CR-06561) **ORDER MODIFYING OPINION AND DENYING REHEARING** **[No Change in Judgment]**

It is ordered that the opinion filed in the above-entitled matter on June 25, 2020, be modified as follows:

On page 62, at the end of the first sentence of the Disposition, add as footnote 5 the following footnote:

> [5]In a petition for rehearing filed by defendant on July 9, 2020, he argues for the first time on appeal that his case should be remanded for a resentencing hearing to allow the trial court to exercise its newly granted discretion to strike the firearm enhancement imposed under Penal Code section 12022.53, subdivision (d). He notes this discretion was granted when Senate Bill No. 620 (2017–2018 Reg. Sess.) took effect on January 1, 2018. Because this matter is remanded to the trial court for, among other reasons, resentencing, we need not address this argument any further. Defendant may make his request for discretionary striking of his enhancements directly to the trial court at the time of resentencing.

There is no change in the judgment. Appellant's petition for rehearing is denied.

PEÑA, J.

WE CONCUR:

LEVY, Acting P.J.

FRANSON, J.

Filed 6/25/20 P. v. Phomvilay CA5 (unmodified opinion)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. VONG PHOMVILAY, Defendant and Appellant.	F076279 (Super. Ct. No. 15CR-06561) **OPINION**

APPEAL from a judgment of the Superior Court of Merced County. Ronald W. Hansen, Judge.

Scott Concklin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Catherine Tennant Nieto, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Two men shot at Francisco Gonzalez and Victor Huerta in the street in March 2000. As a result of the shooting, Gonzalez was fatally injured and a bullet pierced

Huerta's shoulder. An eyewitness identified defendant Vong Phomvilay as one of the perpetrators and he was charged in connection with the shooting. A jury convicted defendant of Gonzalez's murder, the unpremeditated attempted murder of Huerta, and unlawful possession of a firearm.

On appeal, defendant argues his convictions for attempted murder and unlawful possession of a firearm must be reversed because they were time-barred by the applicable statutes of limitations. He challenges all of his convictions, arguing insufficient evidence established he was the perpetrator. He also alleges multiple instructional errors. He asserts the court prejudicially erred in instructing the jury with CALCRIM No. 315 (eyewitness testimony identifying defendant), CALCRIM No. 362 (consciousness of guilt), CALCRIM No. 361 (failure to explain or deny adverse testimony), CALCRIM No. 302 (evaluating conflicting evidence), and CALCRIM No. 332 (expert witness testimony) because these instructions were unsupported by the evidence and led to an irrational presumption of guilt, and/or reduced the prosecution's burden of proof. Defendant also challenges the photographic lineup shown to an eyewitness, asserting it was unduly suggestive. He argues the trial court abused its discretion in admitting evidence of his gang affiliation, his prior conviction, and his outstanding misdemeanor warrants, as well as testimony regarding marijuana sales by others. He contends the prosecutor engaged in misconduct by arguing a prosecution witness would be targeted for testifying. He further contends the court prejudicially erred by instructing the jury on a legally impossible theory—that he could be convicted of attempted murder based on a theory he conspired to commit an attempted implied malice murder. Finally, he contends the cumulative effect of these errors resulted in a violation of his due process rights, and the abstract of judgment should be amended because it erroneously states he received a consecutive term for count 3.

We agree that counts 2 and 3 are time-barred and thus reverse defendant's convictions for attempted murder and felon in possession of a firearm and remand for the

trial court to hold a new sentencing hearing. In all other respects, we affirm the judgment.

FACTUAL BACKGROUND

Prosecution Case

The March 26, 2000, shooting

At trial, Huerta testified that on March 26, 2000, he, Gonzalez, Andrew Garibaldi, and Javier Castro drove from Los Banos to Merced so Huerta could meet with a girl he had recently met, Lorena T. They planned to "kick back and party." When the group arrived at Lorena's address, they parked, and Huerta exited the car and went to Lorena's door. He and Lorena stood outside "deliberating" because she had not gathered her friends as planned. Huerta eventually determined the gathering was not going to happen. He walked towards the car and saw Gonzalez walking toward him. Huerta heard a "pop" and ran for cover. He pushed his way into the door of a nearby apartment and waved to Gonzalez to follow. Huerta heard another louder "pop" that sounded like a shotgun. A woman inside the apartment told Huerta to leave because they were shooting at him. Huerta then realized he had been shot and his whole sleeve was covered in blood. Another occupant notified Huerta the alley had cleared and his friend (Gonzalez) was on the ground. Huerta ran to Gonzalez and "he was on his last breaths." Huerta did not see who pulled the trigger.

Huerta identified himself as a Norteño "associate" at the time. He testified Gonzalez was wearing a red sweatshirt and had tattoos identifying himself as a Norteño. Garibaldi reported to police that they were part of the West Side Norteños. Detective Joseph Deliman, a Merced police officer in 2000, testified Oriental Troop and True Blue are Asian gangs within the City of Merced that associate with the color blue. They were enemies of the Norteños.

Castro testified he and Garibaldi were in the car when they heard shots. Right before, Castro saw "two dark figures come out from the alleyway, but it was too dark."

One of the men reached down, appearing to tie his shoe, and then got back up and pulled out a gun. Castro thought one of the men had a shotgun and the other had a handgun. Castro saw them shoot towards Gonzalez and Huerta and then run away. He testified there was a getaway driver nearby and the two men jumped in the car and left. Castro told the police right after the incident the two men were "definitely" Asian, but at trial he testified he could not see the shooters' faces. Garibaldi also reported the men were both Asian.

Mayra A. lived near the alleyway where the shooting took place. Right before the shooting, she went outside to retrieve her sister, Carla A., who was sitting in the parked car of her boyfriend, Joseph A. As Mayra walked to the car, she heard people speaking with raised voices and then saw a spark. Then, "the victim that got shot … went back, and then fell to his knees." Mayra described the shooter as a five-foot six male in a black sweater. The shooter turned away and Mayra ran to her sister in the car. Mayra would not get in, so Carla and her boyfriend drove away. Mayra testified she was "kind of scared" of the people in her building because they were "always drinking, smoking, always wearing their colors." She explained that a lot of the building occupants were Asians who would wear blue attire.

Carla testified she saw the shooting occur while she sat in Joseph's car. She first saw the "red group" talking to some girls outside. She saw the victim, Gonzalez, walk to the car and then walk back towards the apartment. Then she "saw two guys … one with a shotgun, the other one with a small gun" and they shot Gonzalez. Gonzalez fell to his knees and the men fired a second shot before running away.

Joseph also saw the shooting and he knew Gonzalez. However, he was not familiar with the shooters. According to Joseph, the shooters wore black and one had a shotgun. He recalled driving away with Carla and Carla telling him she knew the shooter.

The investigation and photographic lineup identification

Officer Matt Pope interviewed Carla, Garibaldi, and Castro after the shooting. In his interview with Carla the day after the shooting, Carla "said she got a good look at the suspects" and "she knew the one suspect that was holding the shotgun." Carla described the person she saw with the shotgun; she recalled the shooter was "young-looking" and he had "very thick eyebrows" and that both men were Asian and wore black. She stated she previously had seen the shooter hanging around the back area of the alley. She told Pope the suspect lived "in back of 120 S Street," and that she saw the shooters approach from the back of that property. Later that day, Pope executed a search warrant on that location where he found defendant, Lo Saetern, Lekxai Soulanone, and another individual named Tawn Saechao.

Pope interviewed defendant that evening at the police station. Defendant told him he had not shot a gun in the last year. Defendant admitted he and his cousin Lekxai Soulanone had been members of Oriental Troop in the past but were not members on that date. Defendant explained "there was really no way to identify the difference" between the gangs True Blue and Oriental Troop and that there was no gang rivalry between them.

Pope performed a gunshot residue test on defendant at the conclusion of the interview. Pope also tested Lekxai Soulanone for gunshot residue and interviewed him.

The day after the shooting, Detective Pope showed Carla four different lineups. After he read Carla the admonitions, Carla "quickly identified the subject in position No. 2 as the perpetrator with the shotgun" and stated she knew him. The parties stipulated the photograph Carla identified was defendant. Approximately a month later, Pope met with Carla and she confirmed "she was still 100 percent positive on her first identification, which was [defendant]" and had "[n]o doubt."

At trial, when the prosecutor asked Carla if she saw the shooter with the shotgun, she testified "17 years passed," she could not "make sure … it was the same person or not." However, she confirmed she identified defendant's photograph in the lineup as the

shooter. Carla thought the photograph "looked like the shooter" because of his eyes and eyebrows. She explained the shooter was wearing a mask, but it covered "not that much" and, at some point, the shooter had the mask pulled down and she could see his eyes. Carla believed the shooters knew Huerta and Gonzalez were there based on the way they approached; they did not hesitate before shooting them. Carla testified she was "pretty sure" the person she identified as the shooter was involved in gangs "[i]f he hangs around with those people." She acknowledged she told Detective Pope the shooters were True Blue but testified at trial she was "not saying they were True Blue," she was just "saying they were Asian."

Captain Bimley West was a detective who interviewed defendant on March 29 and 30, 2000, in connection with the shooting. According to West, in 2000, defendant reported he was once a member of the gang Oriental Troop and he had not handled a weapon in four or five years. Defendant told West he was at home in his motor home at 120 S Street with two individuals—Lo Saetern and Lekxai Soulanone—watching movies before the shooting occurred on March 26th. He reported wearing "a blue shirt and blue shorts and he was wearing sandals" at the time. Defendant told West Lo and Lekxai left the motor home for Lo's house about 10 to 15 minutes before the shooting.

Lekxai Soulanone, defendant's cousin, testified he lived with defendant near the alleyway in March 2000. He too reported that, before the shooting, he was "in the motor home watching a movie and eating chicken soup with [his] cousin." Then, he and Lo Saetern went and sat outside for 10 to 20 minutes. While outside, Lekxai recalled seeing "two Mexican guys talking to a Mexican girl." He denied seeing the shooting, but he heard gunshots from what he thought were two different weapons. Lekxai ran into the house; the victim's friend followed him inside. Lekxai called 911 and then Lekxai's mother came to retrieve him and they went home. Lekxai saw defendant in their driveway on his way home. Lekxai denied he or anyone in his house shot a gun that day but stated he did not know if defendant shot one. At some point after the shooting, police

arrived and questioned Lekxai. He admitted he and defendant were in Oriental Troop in the past but denied being a member at the time of the shooting.

Fifteen years later, in December 2015, Detective Jeffrey Horn interviewed defendant in connection with the shooting again. Defendant told Horn he was a part of the Oriental Troop gang at the time of the shooting.

Officer Tom Trinidad testified as a gang expert on behalf of the prosecution. He was a gang officer in the City of Merced Police Department from 1997 to 2006. In that unit, his primary responsibility "was to focus on street-related gang crimes that were occurring and prevent them from happening." As a gang intelligence officer, Trinidad was tasked with gathering all police reports generated by officers in the City of Merced and other agencies in the county to identify trends and disseminate that information to law enforcement agencies within the county. He explained the area where the shooting took place in Merced was referred to as "Ghost Town." The area included a combination of residential housing and an apartment complex controlled by members of the Asian gangs Oriental Troop, True Blue, and Oriental Locs that had a "very strong" presence there. He explained True Blue and Oriental Locs were the younger, second generation of Oriental Troop, and all three gangs were affiliated with each other and worked together. All three gangs "considered themselves Crips" and associated with the color blue. Trinidad testified Hispanic gangs in Merced "primarily claim red, or Norteños." He explained if Norteños came into Ghost Town, it could be seen as "disrespect, an affront" "[b]ecause they were red," "[t]hey're a rival gang." He mentioned Asian gang members used to be more "loosely organized" but they "started falling in traditional gang roles" as they "became more Americanized," "aligning themselves with Crips or Bloods" and "going after traditional lines of gang history and tradition."

Gunshot residue analysis evidence

Steven Dowell, a former criminalist in the medical examiner's office in Los Angeles County, testified on behalf of the prosecution as an expert in gunshot residue analysis. He identified "three characteristic elements" of gunshot residue that could be found in a shotgun shell—antimony, barium, and lead. He explained there is an ejection port in a firearm that permits, along with the trigger housing, some of the gunshot particles to leak out of the firearm. The particles vaporize from the heat and then "recondense" into spherical or oval particles as they cool, whereas normal lead particles that had not vaporized might be irregularly shaped. Dowell received gunshot residue collection kits from defendant and Lekxai Soulanone. Dowell found "no particles of gunshot residue on either [Lekxai's] right or left hand samples."

However, Dowell "found many consistent particles of gunshot residue," meaning particles that had two of the three elements characteristic of gunshot residue, in the samples taken from the backs of defendant's right and left hands. There were several consistent particles on defendant's right palm and a few consistent particles of gunshot residue on defendant's left palm. Dowell explained the results of the chemical analysis to the jury. He opined that someone who discharges a firearm is more likely to have residue on the backs of their hands than the palms because the palms are protected from the residue. He testified consistent particles such as those found on defendant's hands could be from a number of sources. They "can be from the discharge of a firearm," the "zone" where a firearm is discharged, or "from an environmental source," such as working with a lead smelter. Dowell confirmed he could not say the particles on defendant's hands were gunshot residue; he could only say they were consistent with gunshot residue.

The prosecution also presented a second gunshot residue expert, Meagan Gallagher from the California Department of Justice. Gallagher also opined the gunshot residue testing sample taken from defendant contained "no characteristic gunshot residue particles containing all three elements, lead, barium, [and] antimony." However, she

found six lead and antimony particles with a molten appearance in the sample taken from defendant's left hand, which evidences the particles were heated up at a very high temperature and pressure, part of her criteria for identifying gunshot residue. She also found other molten-appearing particles of only lead and only barium on the samples taken from defendant's hands. She identified potential sources of these molten-appearing particles other than gunshot residue, including pyrotechnics, solder, and brake pads. She testified, "typically around four to six hours after a person has handled a firearm or gotten gunshot residue on their hands," the residue is gone "with general, average physical activity," though it could remain if a person were to stay motionless. She had not seen a positive sample outside of six hours but assumed one would originate from "a secondary exposure to the gunshot residue environment." In her report, Gallagher noted the two-component (lead and antimony) particles identified on the back of defendant's left hand are particles found in gunshot residue, but environmental sources could not be excluded.

Defense case

Defendant testified on his own behalf. He denied shooting anyone on March 26, 2000. He admitted he was a member of Oriental Troop when he was younger. He remembered hearing loud sounds on the night of the shooting. Defendant, his cousin Lekxai Soulanone, and their friend Lo Saetern had been watching a movie in the motor home on their property about 20 minutes before the shots. Lekxai and Lo left to go to Lo's house and defendant was about to go to sleep when he heard shots that woke him up; he looked out the window but did not see anything. He walked outside to the gate on the property but did not see the shooter. The next day, the police arrested him, and he was incarcerated for 11 months. He was released in February 2001 and then arrested again in 2015.

Defendant's sister, Dokom Phomvilay, also testified. In March 2000, she lived at 120 S Street with defendant and other family members. She recalled hearing a gunshot in the evening of March 26, 2000. She went looking for her children to make sure they

were in the house and then went to the motor home on the property to find defendant. Dokom testified defendant answered the door to the motor home in response to her knocking approximately a minute after she heard the gunshot.

Defendant's niece, January Vorsaith (Dokom's daughter), also testified about the night of the shooting. She recalled hearing two gunshots then seeing through the living room window "[t]wo guys running down an alley" "towards [her] backyard." She also lived on the same property as defendant. She testified she saw defendant come through the back door in their kitchen a minute or two after she heard the gunshots. The police never spoke to January, who was fifteen years old at the time.

The defense presented a gunshot residue expert who testified she was surprised the police did a gunshot residue kit on defendant about 20 hours after the shooting because "after four to six hours, the original set of [gunshot] particles is most likely gone." Accordingly, she opined "[b]ased on [her] training, experience, and background, it is most likely that [what they found on defendant's hands was] not gunshot residue particles."

The defense also presented an expert on eyewitness memory and suggestibility. He testified about factors that can affect or influence an eyewitness's identification, including stress, trauma, unconscious transference which he defined as "confusing a similar-looking face with a face of the perpetrator," and cross-race identifications. He noted, "memory reports given immediately afterwards [are] the best piece[s] of data." He explained, "It becomes harder and harder as more time has passed to recall the face and differentiate from others. It's easier if it's closer. The task becomes impossible after a long period of time, of course."

PROCEDURAL HISTORY

The People filed a complaint on December 9, 2015, charging defendant with Gonzalez's murder (Pen. Code,[1] § 187) (count 1), enhanced by an allegation he personally discharged a firearm causing bodily injury and death (§ 12022.53, subd. (d)), attempted willful, deliberate and premeditated murder (§§ 664, 187) of Huerta (count 2), enhanced by an allegation he personally discharged a firearm causing bodily injury and death (§ 12022.53, subd. (d)), and unlawful possession of a firearm (former § 12021.53, subd. (a)(1)). In January 2016, the People filed an information against defendant reflecting the charges, in which count 2 alleged unpremeditated attempted murder of Huerta. The jury convicted defendant of all the counts and found true the allegation he personally discharged a firearm causing bodily injury and death in violation of section 12022.53, subdivision (d) as to count 1.

On count 1, the court sentenced defendant to an indeterminate term of 15 years to life plus an additional 25 years to life for the firearm enhancement to be served consecutively. The court also sentenced defendant to nine years on count 2 and a concurrent term of three years on count 3, for a total aggregate term of 49 years to life.

DISCUSSION

I. Defendant's Convictions for Counts 2 and 3 Must Be Reversed Because They Are Barred by the Applicable Statutes of Limitations

Defendant argues, and the People concede, his convictions for attempted murder and felon in possession of a firearm must be reversed because they were time-barred. We agree.

A. Standard of Review and Applicable Law

"An accusatory pleading must allege facts showing that the prosecution is not barred by the statute of limitations." (*People v. Crosby* (1962) 58 Cal.2d 713, 724.)

[1]Undesignated statutory references are to the Penal Code.

"[A]s the bar of the statute is a jurisdictional defect rather than simply an affirmative defense …, the burden is on the People of establishing that the offense was committed within the applicable period of limitations." (*Id*. at p. 725.) "Failure to sustain that burden will result in vacation or reversal of the judgment of conviction." (*Ibid*.)

"[W]hen the charging document indicates on its face that the action is time-barred, a person convicted of a charged offense may raise the statute of limitations at any time [including for the first time on appeal]. If the court cannot determine from the available record whether the action is barred, it should hold a hearing or, if it is an appellate court, it should remand for a hearing." (*People v. Williams* (1999) 21 Cal.4th 335, 341.)

Section 800 prescribes a six-year limitations period for offenses punishable by eight years' imprisonment or more. Attempted murder, not alleged to have been willful, premeditated, and deliberate, is punishable by a maximum of nine years' imprisonment. (See § 664, subd. (a).) "An offense is deemed punishable by the maximum punishment prescribed by statute for the offense, regardless of the punishment actually sought or imposed." (§ 805, subd. (a).) Accordingly, attempted murder, not alleged to have been committed with premeditation, has a six-year limitations period, meaning prosecution must commence "within six years after commission of the offense." (§ 800.)

Felonies punishable by less than eight years' imprisonment are generally subject to a three-year limitation period. (§ 801.) Accordingly, the crime of illegal firearm possession by a felon in violation of former section 12021, subdivision (a)(1) was subject to a three-year statute of limitations. (§ 801, former § 12021, subd. (a)(1).)

> "[P]rosecution for an offense is commenced when any of the following occurs:
>
> "(a) An indictment or information is filed.
>
> "(b) A complaint is filed charging a misdemeanor or infraction.
>
> "(c) The defendant is arraigned on a complaint that charges the defendant with a felony.

> "(d) An arrest warrant or bench warrant is issued, provided the warrant names or describes the defendant with the same degree of particularity required for an indictment, information, or complaint." (§ 804.)

B. Analysis

Defendant contends the charges for attempted murder (count 2) and unlawful possession of a firearm (count 3) were facially time-barred and, thus, his related convictions must be reversed. He argues none of the tolling provisions of section 803 apply to render these counts timely. He asserts, even if he had left the state after commission of the offense pursuant to section 803, subdivision (d), this tolling provision only permits extension of the statute of limitations for a maximum of three years. Thus, for the charges to have been timely, prosecution must have "commenced" on count 2 by 2010, and on count 3 by 2007, which they had not. He further notes, though "a prosecution can commence by issuance of an arrest warrant (… § 804, subd. (d)), it must be one issued in *this* prosecution." Accordingly, he argues because the "tolling provisions are either inapplicable or incapable of curing the untimeliness," remand for the trial court to consider whether the action is barred is unnecessary. Instead, he contends, these counts must be reversed. The People concede defendant's convictions for counts 2 and 3 must be reversed because the charges were not brought within the limitations periods.

As evidenced by the face of the criminal complaint, the shooting giving rise to defendant's charges occurred on March 26, 2000. However, the complaint in the instant case was not filed against defendant until December 9, 2015, over 15 years later.[2] Accordingly, the prosecution of counts 2 and 3 did not commence within the respective six- and three-year limitations periods and these charges were facially time-barred. (See §§ 800, 801.)

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[2]The record also indicates a so-called *Ramey* warrant (*People v. Ramey* (1976) 16 Cal.3d 263) for defendant's arrest was issued on December 7, 2015, over 15 years after the shooting.

Defendant notes he was arrested, and a case was previously filed against him in 2000 in connection with the charged offenses, but that case was dismissed and defendant was released from jail in February 2001. He contends, even if an arrest warrant was previously issued in 2000, the limitations period would only have been tolled while the previous action was pending—until 2001. (See *People v. Le* (2000) 82 Cal.App.4th 1352, 1358 ["earlier and later prosecutions are distinct, and the statute of limitations is tolled while the earlier prosecution is pending"].) The limitations period began to run again when the previous action was dismissed until the untimely prosecution of the instant case commenced in December 2015, when an arrest warrant was issued against defendant and a felony complaint was filed. The People do not challenge defendant's assertions.

Because these charges were facially time-barred and there is no evidence the statute of limitations was tolled such that the charges would be rendered timely, we accept the People's concession and conclude defendant's convictions on counts 2 and 3 must be reversed. (See *In re Demillo* (1975) 14 Cal.3d 598, 602 [vacating judgment and concluding trial court lacked jurisdiction where information was filed over two years after expiration of limitations period and information alleged no facts to excuse delay].)

II. Sufficient Evidence Established Defendant Was the Perpetrator

Defendant next argues the evidence was insufficient to establish his identity as the perpetrator. We disagree.

A. Relevant Factual Background

After the prosecutor introduced Carla's identification of defendant from the photo lineup, Carla testified regarding her familiarity with defendant:

> "Q. Before this day when Francisco Gonzalez was shot, when was the last time, if you remember, you had seen the defendant, the person you identified in the photo lineup?

"A. I had saw him a week, around there, or sooner. Like I said, he lives—he was living right next to me.

"Q. Do you know if he had family in the area, too?

"A. No, I do not know.

"Q. How well did you know his face?

"A. That he was always outside with his friends.

"Q. Would you say you knew his face well?

"A. No.

"Q. Did you tell the detective that you knew his face well?

"A. No. I said I knew where they would hang out. I knew who were they or somewhat thing [*sic*]."

In his summation, the prosecutor argued four elements identified defendant as the shooter: Carla's identification, the gunshot residue kit results, the alleged gang motive, and evidence that defendant had the opportunity to commit the crime.

B. Standard of Review

On appeal, the relevant inquiry governing a challenge to the sufficiency of the evidence "'is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1055.) The reviewing court's task is to review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—evidence that is reasonable, credible, and of solid value upon which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

"In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is

> physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

We "presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis … is there sufficient substantial evidence to support"' the jury's verdict." (*Ibid*.)

C. Applicable Law

> "Identification of the defendant by a single eyewitness may be sufficient to prove the defendant's identity as the perpetrator of a crime. [Citation.] Moreover, a testifying witness's out-of-court identification is probative for that purpose and can, by itself, be sufficient evidence of the defendant's guilt even if the witness does not confirm it in court. [Citations.] Indeed, 'an out-of-court identification generally has *greater* probative value than an in-court identification, even when the identifying witness does not confirm the out-of-court identification: "[T]he [out-of-court] identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind. [Citations.] …" [Citations].' [Citation.]" (*People v. Boyer* (2006) 38 Cal.4th 412, 480; accord, *People v. Cuevas* (1995) 12 Cal.4th 252, 263–275.)

"[T]he sufficiency of an out-of-court identification to support a conviction should be judged by the substantial evidence standard." (*People v. Cuevas, supra*, 12 Cal.4th at p. 277.) "[T]he availability of the identifying witness for cross-examination, the opportunity of the defense to present other evidence questioning the reliability of the out-of-court identification and to request appropriate jury instructions, and the requirement that substantial evidence support the conviction are adequate safeguards against the unjust conviction of a defendant solely on the basis of an unreliable out-of-court identification." (*Id*. at pp. 274–275.)

D. Analysis

Defendant argues Carla's identification is insufficient to support the jury's verdict because it was unreliable. In support, he contends Carla denied the perpetrator had a mustache though defendant had a "thick beard and mustache" in his photograph taken the day after the shooting; Carla recanted her identification of the second suspect; she did not identify defendant as the perpetrator at trial; she testified she initially identified defendant's picture as someone "who might have been" the perpetrator based on his eyes and eyebrows; and "[s]he witnessed the shooting from a parked car, it was dark out, the shooting occurred quickly, she was in a state of panic, and the gunmen were wearing masks." Defendant further contends the gunshot residue evidence was inconclusive and did not bolster Carla's identification because it was taken 21 hours after the shooting and did not reveal characteristic gunshot residue particles. He asserts the People's evidence of identity was thus "'so fraught with uncertainty as to preclude a confident determination of guilt beyond a reasonable doubt,'" so "the verdicts must be reversed for lack of sufficient evidence." The People respond Carla's identification was credible, particularly given her prior familiarity with defendant, and the evidence was sufficient to support defendant's convictions. They contend Carla's identification in conjunction with the other evidence was sufficient to establish defendant's identity as the perpetrator. We agree with the People—substantial evidence established defendant's identity as the perpetrator.

Here, Carla's out-of-court identification was reasonable, credible evidence of solid value from which a reasonable jury could conclude beyond a reasonable doubt that defendant was the perpetrator. Immediately following the incident, Carla notified police the shooter hung out in the alley near 120 S Street—defendant's residence where police found him after the offense. Carla testified regarding her familiarity with defendant before the crime, which was further evidenced by her knowledge of where he lived. Then, the day after the shooting, the police showed Carla four different lineups and she

"quickly identified [defendant] as the perpetrator with the shotgun" and stated she knew him. Approximately a month later, police met with Carla again and she confirmed "she was still 100 percent positive on her first identification, which was [defendant]" and had "[n]o doubt." It is of no consequence that Carla was not able to identify defendant in court as the shooter 17 years later. (See *People v. Boyer*, *supra*, 38 Cal.4th at pp. 480–481; *People v. Cuevas*, *supra*, 12 Cal. 4th at p. 276.) Indeed, defendant's own expert testified identifications become harder and harder over time until they are "impossible."

Though defendant challenges Carla's credibility, we do not reweigh evidence or reevaluate a witness's credibility. (*People v. Alexander* (2010) 49 Cal.4th 846, 917.) Here, defendant's counsel had a full opportunity to cross-examine Carla, not only about her degree of certainty in her photo selection, but about all aspects of the identification process, including the conditions under which she had observed the perpetrator, and about her recanting her identification of the second perpetrator. Defendant also presented expert testimony on factors affecting the accuracy of eyewitness identifications. Under these circumstances, the jury was able to evaluate the credibility of Carla's identification, and the weight her testimony deserved was for the jury to resolve. (See *People v. Boyer*, *supra*, 38 Cal.4th at p. 481.) Accordingly, we conclude her out-of-court identification was sufficient evidence to establish defendant's identity as the perpetrator. (See *id.* at pp. 480–481 [witness's identification of defendant in photo array on night of murder was sufficient evidence of identity though witness "did not independently identify defendant in the courtroom, or confirm that she remained certain of her photo identification" because "the jury was able to evaluate the credibility of [the witness's] identification, and the weight her testimony deserved was for the jury to resolve"]; *People v. Cuevas*, *supra*, 12 Cal.4th at p. 276 [witnesses' out-of-court statements were substantial evidence defendant was shooter despite witnesses' recantations at trial where one witness was acquainted with defendant before the shooting and identified defendant as the perpetrator immediately after offense and three days later, and both witnesses provided physical

descriptions consistent with defendant's appearance]; see also *People v. Braun* (1939) 14 Cal.2d 1, 5 ["To entitle a reviewing court to set aside a jury's finding of guilt, the evidence of identity must be so weak as to constitute practically no evidence at all"].)

Defendant relies upon *People v. Trevino* (1985) 39 Cal.3d 667 to argue Carla's out-of-court identification was insufficient to sustain his conviction; however, *Trevino* is inapposite. In *Trevino*, the California Supreme Court concluded insufficient evidence supported a defendant's conviction where the People relied heavily on the testimony of a witness to establish the defendant's presence at the crime scene at or about the time of the victim's death. (*Id*. at p. 696.) However, the witness was never able to positively identify the defendant as one of the perpetrators—she could not identify the defendant in a physical lineup after the offense, she identified a different person as the second perpetrator, her description of the second perpetrator did not match the defendant's physical attributes at the time of the offense, and she admitted on the stand that she could not identify the defendant "'other than he is the type of man that came through that corridor.'" (*Id*. at p. 678, see *id.* at pp. 677, 696.) No other evidence connected the defendant to the crime scene—the victim's home—other than a singular fingerprint of "unknown vintage" which the court concluded was not "'substantially incriminating,'" particularly in light of other evidence the defendant and victim were friends and the defendant visited the victim on occasion. (*Id*. at pp. 696–697.)

Unlike in *People v. Trevino*, *supra*, 39 Cal.3d 667, Carla did not provide a "highly speculative and equivocal" identification; rather, she positively identified a picture of defendant as the perpetrator immediately after the shooting and directed police to his residence. She was familiar with defendant and also affirmed she was certain about her identification weeks later.

Furthermore, the People presented additional evidence connecting defendant to the shooting. The gunshot residue test results established the presence of particles consistent with, albeit not characteristic of, gunshot residue on defendant's hands within a day of the

shooting. The People presented expert testimony that the presence of such particles could result from recent exposure to a fired gun or spent ammunition. Though the gunshot residue test results did not reflect all of the elements necessary to conclusively establish the particles were gunshot residue and defendant offers a variety of explanations for their presence on his hands, the jury reasonably could have inferred their presence resulted from defendant recently handling a firearm. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11 [“““““If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment”””””].) Additionally, as argued by the prosecutor, defendant admitted being in the vicinity of the crime when it occurred and thus, there was evidence he had the opportunity to commit it. The prosecution also offered evidence of motive—defendant conceded he was previously a member of the gang Oriental Troop and there was other evidence the deceased victim was wearing a rival gang’s colors on the night of the shooting. Though defendant presented witnesses attesting to his presence at the house in the moments after the shooting, the jury, as the sole judge of the credibility of witnesses, could reasonably have rejected such evidence and instead accepted the evidence implicating defendant. (See *People v. Young*, *supra*, 34 Cal.4th at p. 1181.) Thus, on this record, there was sufficient evidence upon which the jury could rely to conclude defendant was the perpetrator.

III. Alleged Instructional Error

Defendant also raises numerous claims of instructional error. We address and reject each in turn.

A. Standard of Review

Instructional errors are questions of law, which we review de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218; *People v. Cole* (2004) 33 Cal.4th 1158, 1210.) We must ascertain the relevant law and determine whether the given instruction correctly

stated it. (*People v. Kelly* (1992) 1 Cal.4th 495, 525–526.) If error is found under state law, it is assessed for prejudice using the standard described in *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*), the question being whether defendant has demonstrated a reasonable probability he would have obtained a more favorable result had the error not occurred. (*People v. Moore* (2011) 51 Cal.4th 1104, 1130.) The challenged instruction is viewed "in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner." (*People v. Houston* (2012) 54 Cal.4th 1186, 1229.)

Heightened scrutiny is applied when evaluating errors that infringe upon a party's due process rights, e.g., the use of jury instructions that relieve the prosecution of its burden to prove each element of the charged offense beyond a reasonable doubt. (See *People v. Flood* (1998) 18 Cal.4th 470, 491–504.) Such errors are considered prejudicial unless the reviewing court determines "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*People v. Chapman* (1967) 386 U.S. 18, 24.)

B. The Court Did Not Prejudicially Err by Instructing the Jury with CALCRIM No. 315

Defendant first argues the court erred in instructing the jury on the evaluation of eyewitness testimony identifying him as the perpetrator because it was unsupported by the evidence.

1. Relevant Procedural History

In accordance with CALCRIM No. 315, the court instructed the jury on eyewitness testimony:

> "You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony.
>
> "In evaluating identification testimony, consider the following questions:

"• Did the witness know or have contact with the defendant before the event?

"• How well could the witness see the perpetrator?

"• What were the circumstances affecting the witness's ability to observe, such as lighting, weather conditions, obstructions, distance, and duration of observation?

"• How closely was the witness paying attention?

"• Was the witness under stress when he or she made the observation?

"• Did the witness give a description and how does that description compare to the defendant?

"• How much time passed between the event and the time when the witness identified the defendant?

"• Was the witness asked to pick the perpetrator out of a group?

"• Did the witness ever fail to identify the defendant?

"• Did the witness ever change his or her mind about the identification?

"• How certain was the witness when he or she made an identification?

"• Are the witness and the defendant of different races?

"• Was the witness able to identify other participants in the crime?

"• Was the witness able to identify the defendant in a photographic or physical lineup?

"• Were there any other circumstances affecting the witness's ability to make an accurate identification?

"The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find the defendant not guilty."

2. Analysis

Defendant argues the trial court erred in instructing the jury with CALCRIM No. 315 which provides in relevant part: "You have heard eyewitness testimony identifying the defendant." He asserts neither Carla nor any other eyewitness identified him as the perpetrator in their testimony at trial; thus, there was no eyewitness testimony. He contends, the jury instruction "'deprive[d] the jury of its factfinding role'" because the jury was required to accept the instruction on the law as true, thereby relieving the People of their burden to produce evidence identifying defendant as the perpetrator. Accordingly, he argues the instruction misstated the law and violated his due process rights. The People argue Carla's testimony amounted to eyewitness testimony identifying defendant as the perpetrator, so it was not error to include such an instruction. We agree with the People.

At trial, Carla testified she saw the shooting take place and stated, under oath, that she identified defendant in a photo lineup within days of the shooting. She confirmed the signature on the form attached to the photographic lineup was hers and that she selected the second photograph, which the parties stipulated was defendant. Thus, Carla, an eyewitness, provided testimony identifying defendant as the perpetrator. While at trial she could not recall her degree of certainty at the time of her selection, Carla affirmed she was honest with police when she spoke to them. And, as provided for in CALCRIM No. 315, the jury was instructed to consider whether Carla changed her mind about the identification, how certain she was when she made the identification, and any other circumstances affecting her ability to make an accurate identification. (*Ibid*.)

On this record, we cannot conclude the court erred in instructing the jury with CALCRIM No. 315, including the portion that provides, "You have heard eyewitness testimony identifying the defendant." We also cannot conclude, as defendant argues, that the challenged instruction reduced the People's burden of proof—to the contrary, it reminded the jury the prosecution bore the burden of proving its case beyond a

reasonable doubt. And the unchallenged portion of the instruction focused "the jury's attention on facts relevant to its determination of the existence of reasonable doubt regarding [Carla's] identification, by listing, in a neutral manner, the relevant factors supported by the evidence." (*People v. Wright* (1988) 45 Cal.3d 1126, 1141; see *id.* at p. 1143.)

Accordingly, we reject defendant's contention.

C. The Court Did Not Prejudicially Err by Instructing the Jury on "Consciousness of Guilt"

Defendant next challenges the inclusion of CALCRIM No. 362, which discusses the evaluation of false or misleading statements by the defendant.

1. Relevant Procedural History

The court instructed the jury with CALCRIM No. 362:

> "If the defendant made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt.
>
> "If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

2. Applicable Law

"'False statements regarding incriminating circumstances constitute evidence which may support an inference of consciousness of guilt. [Citations.]'" (*People v. Flores* (2007) 157 Cal.App.4th 216, 221, quoting *People v. Showers* (1968) 68 Cal.2d 639, 643.) The false nature of the defendant's statement may be shown by inconsistencies in the defendant's own testimony, his or her pretrial statements, or by any other prosecution evidence. (See *People v. Kimble* (1988) 44 Cal.3d 480, 498; see also *People v. Edwards* (1992) 8 Cal.App.4th 1092, 1103 ["The falsity of a defendant's pretrial statement may be shown by other evidence even when the pretrial statement is

not inconsistent with defendant's testimony at trial"].) Accordingly, "[a] trial court properly gives consciousness of guilt instructions where there is some evidence in the record that, if believed by the jury, would sufficiently support the inference suggested in the instructions." (*People v. Bowman* (2011) 202 Cal.App.4th 353, 366.)

3. Analysis

Defendant contends the court erred in instructing the jury with CALCRIM No. 362 regarding consciousness of guilt because it was unsupported by the evidence and he was prejudiced as a result of its inclusion. We disagree that the instruction was unsupported or that its inclusion prejudiced defendant or violated his due process rights.

Here, there was some evidence—the gunshot residue test results and Carla's identification—that could have reasonably led the jury to believe that, in his pretrial statement to police following the shooting, defendant falsely denied using a firearm in the past year. If the jury believed the other evidence established defendant had in fact handled a firearm more recently than he told the police, defendant's false pretrial statement would sufficiently support an inference of consciousness of guilt. (See *People v. Edwards*, *supra*, 8 Cal.App.4th at p. 1104 ["If the jury here believed the testimony of other witnesses, it could reasonably have found defendant's pretrial statements were willfully false and deliberately misleading. From this, the jury could have inferred a consciousness of guilt. The trial court properly instructed the jury in CALJIC No. 2.03[, the precursor to CALCRIM No. 362]"]; see also *People v. Hughes* (2002) 27 Cal.4th 287, 335 ["a false denial remains relevant evidence of consciousness of guilt even if there also exists a possible alternate basis for the false denial that would not incriminate defendant as to the charged offenses"].) Notably, "the jury need not believe the prosecution's evidence suggesting that the statement was false, and even if it finds that the statement was false, it need not conclude that defendant deliberately lied to hide his complicity in the crime." (*People v. Kimble*, *supra*, 44 Cal.3d at p. 498.)

Defendant argues his due process rights were violated because CALCRIM No. 362 "permitted the jury to draw an irrational inference of guilt in violation of due process." In a somewhat circular argument, he asserts the jury could have used the other evidence of his guilt—namely Carla's identification and the gunshot residue test results—to conclude his denial of guilt was false; then, the jury could use their conclusion that defendant falsely denied guilt as affirmative evidence of his guilt. Accordingly, he contends, "[t]he jury was irrationally permitted to use [his denial of guilt] as affirmative evidence showing that he knew that he was in fact the shooter."

A permissive inference or presumption allows—but does not require—the trier of fact to infer an elemental fact from proof by the prosecutor of a basic fact; it places no burden of any kind on the defendant. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157.) There should be a "'rational connection' between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter is 'more likely than not to flow from' the former." (*Id*. at p. 165.) A "permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." (*Id*. at p. 157.)

Here, CALCRIM No. 362 did not permit an irrational inference of guilt. As the California Supreme Court has noted, such an instruction does "not assume the existence of evidence relating to each charge; [it] merely instruct[s] the jury on the use of such evidence should it be found to exist." (*People v. Crandell* (1988) 46 Cal.3d 833, 870; see *People v. Mendoza* (2000) 24 Cal.4th 130, 180 ["It is for the jury to determine to which offenses, if any, the inference [of consciousness of guilt] should apply"].) "[I]nsofar as the jury believed defendant lied about the charged crimes, the instruction d[oes] not generate an irrational inference of consciousness of guilt." (*People v. Stitely* (2005) 35

Cal.4th 514, 555.) Thus, we cannot conclude instructing with CALCRIM No. 362 violated defendant's due process rights.

And defendant has not otherwise established prejudice. "[E]ven if we assume for purposes of argument that the instruction should not be given where the only allegedly false statement is a mere denial of guilt, any error in giving the instruction would be harmless under any standard." (*People v. Williams* (2000) 79 Cal.App.4th 1157, 1166, fn. 8.) "The instruction would apply only if the jury found the denial to be false, and this would necessarily mean that the jury accepted the prosecution's evidence and rejected the defense case." (*Ibid*.) "Under such circumstances, the inference of guilt arising from a 'false' denial of guilt could add nothing to the jury's evaluation of the evidence and determination of guilt." (*Ibid*.)

Furthermore, here, the trial court informed the jury that some instructions may not apply, and the jury is presumed to have understood and followed the instructions it was given and disregarded the consciousness of guilt instruction if the evidence did not support it. (*People v. Sandoval* (2015) 62 Cal.4th 394, 422; *People v. Pearson* (2013) 56 Cal.4th 393, 414.) Additionally, contrary to defendant's argument, it is well-settled the instruction does not lessen the prosecution's burden of proof; rather,"[t]he cautionary nature of the instructions benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1224; see *People v. Thornton* (2007) 41 Cal.4th 391, 438; *People v. Peyton* (2014) 229 Cal.App.4th 1063, 1078.) Accordingly, even if we were to assume error, we cannot conclude defendant was prejudiced by the referenced instruction.

We reject defendant's contention.

D. The Court Did Not Prejudicially Err by Instructing the Jury with CALCRIM No. 361 (Failure to Explain or Deny Adverse Evidence)

Defendant next argues the evidence did not support the trial court's inclusion of CALCRIM No. 361 regarding a defendant's failure to explain or deny evidence presented against him, and he was prejudiced by its inclusion.

1. Relevant Procedural History

The court instructed the jury with CALCRIM No. 361:

> "If the defendant failed in his testimony to explain or deny evidence against him, and if he could reasonably be expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove the defendant guilty beyond a reasonable doubt.
>
> "If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure."

2. Applicable Law

The California Supreme Court has held CALCRIM No. 361 "applies only when a defendant completely fails to explain or deny incriminating evidence, or claims to lack knowledge and it appears from the evidence that the defendant could reasonably be expected to have that knowledge." (*People v. Cortez* (2016) 63 Cal.4th 101, 117.) "As to incriminating evidence that a testifying defendant denies or explains, there is no silence from which an inference 'may flow.'" (*Ibid*.) "Even if the defendant's testimony conflicts with other evidence or may be characterized as improbable, incredible, unbelievable, or bizarre, it is not … 'the functional equivalent of no explanation at all.' On the other hand, those circumstances *do* suggest that the defendant may have 'deliberately lied about something significant,' in which case a court may … instruct jurors [with CALCRIM No. 226], to 'consider not believing anything that witness says.'" (*Ibid*.)

3. Analysis

Defendant argues it was error for the court to instruct the jury with CALCRIM No. 361 because he did not completely fail "to explain or deny incriminating evidence, nor did he claim a lack of knowledge about something incriminating that he could reasonably be expected to have known." He contends he denied he was the shooter and denied handling or shooting a firearm in the year leading up to the shooting, and "[h]e could not be expected to explain where [the particles consistent with gunshot residue] came from." He also argues the particles found on his hands were not incriminating because they were not characteristic of gunshot residue particles. He further argues the inclusion of CALCRIM No. 361 violated his due process rights in light of "the ambiguity in the verb 'explain,'" which permitted the jury "to use an *unconvincing* explanation as affirmative evidence of guilt." Put differently, he argues CALCRIM No. 361 permitted the jury to draw an irrational inference of guilt if defendant did not "explain away prosecution evidence in a convincing manner." The People assert the instruction was "appropriate because [defendant] failed to explain why he had particles consistent with [gunshot residue] on his hands following the shooting." They contend "[a]lthough [defendant] stated at trial that he may have done some repair work on a car or lawnmower before his hands were tested for [gunshot residue] …, this did not explain the presence of particles consistent with [gunshot residue] on his hands. Such particles could only result where metal had melted, then resolidified." We agree with the People.

Here, though in his pretrial statement, defendant denied shooting a firearm in the year leading up to the shooting, in his trial testimony, defendant did not explain the source of the particles consistent with gunshot residue found on his hands. And we disagree with defendant's assertion that it was unreasonable to expect him to know what could have resulted in the presence of these particles. Defendant was arrested the day after the shooting and provided various details regarding his alleged whereabouts on the day of the shooting including that he, his cousin Lekxai Soulanone, and their friend Lo

Saetern were watching a movie 15 or 20 minutes before he heard shots. Yet, he did not explain what could have resulted in the molten particles consistent with gunshot residue found on his hands within a day of the shooting. We also cannot conclude the challenged instruction led to an irrational inference of guilt. Rather, it merely permitted the jury to consider a failure to explain or deny incriminating evidence, noting it is up to the jury to decide the meaning and importance of that failure.

Moreover, defendant acknowledges that in *People v. Saddler* (1979) 24 Cal.3d 671, the California Supreme Court rejected an argument that a substantially similar instruction—CALJIC No. 2.62—violated a defendant's due process rights by denying him the presumption of innocence and instead raising an inference of guilt. (*People v. Saddler*, *supra*, at pp. 679–680.) In so holding, the *Saddler* court emphasized the instruction cautions the jury that the failure of a defendant to deny or explain "'does not create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of defendant beyond a reasonable doubt.'" (*Id.* at p. 680.) Similar cautionary language is included in CALCRIM No. 361, which warns that a defendant's failure to explain or deny "is not enough by itself to prove guilt. The People must still prove each element of the crime beyond a reasonable doubt." CALCRIM No. 361 further instructs the jury: "If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure." Like the language in CALJIC No. 2.62, we conclude the cautionary language in CALCRIM No. 361 does not relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt. (See *Saddler*, at p. 680; *People v. Rodriguez* (2009) 170 Cal.App.4th 1062, 1066–1067.) We find no violation of defendant's right to due process based on this instruction.

We reject defendant's contention.

E. The Court Did Not Prejudicially Err by Instructing the Jury with CALCRIM Nos. 302 and 332, Which Did Not Reduce the Burden of Proof

Defendant next argues CALCRIM Nos. 302 (evaluating conflicting evidence) and 332 (expert witness testimony) instructed the jury to compare and credit evidence based on a preponderance of the evidence standard.

1. Relevant Procedural History

The court instructed the jury with CALCRIM No. 302:

> "If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point."

The court also instructed the jury pursuant to CALCRIM No. 332:

> "Witnesses were allowed to testify as experts and to give opinions. You must consider the opinions, but you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied was true and accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence.
>
> "An expert witness may be asked a hypothetical question. A hypothetical question asks the witness to assume certain facts are true and to give an opinion based on the assumed facts. It is up to you to decide whether an assumed fact has been proved. If you conclude that an assumed fact is not true, consider the effect of the expert's reliance on that fact in evaluating the expert's opinion.
>
> "If the expert witnesses disagreed with one another, you should weigh each opinion against the others. You should examine the reasons

given for each opinion and the facts or other matters on which each witness relied. You may also compare the experts' qualifications."

2. Analysis

Defendant argues CALCRIM Nos. 302 and 332 "directed jurors to resolve conflicts in the evidence using what amounted to a preponderance of the evidence standard, and implied that defense evidence that was rejected by a preponderance of the evidence could be disregarded in determining guilt beyond a reasonable doubt," thereby "reduc[ing] the People's burden of proof in violation of due process." He argues CALCRIM No. 302 permitted the jury to disregard his alibi if it was not considered believable and convincing, but an alibi need not be convincing so long as "it prevents the jury from reaching a state of 'near certitude' in deciding the defendant's guilt." He asserts CALCRIM No. 302 "implies that if jurors decide to believe one side, conflicting evidence on the other side should be disregarded because it is disbelieved." Similarly, he contends CALCRIM No. 332 permitted the jury to weigh the expert opinions and "pick one opinion to believe and discard the other because it is less believable," thereby applying a preponderance of the evidence test. We disagree with defendant's contentions.

We cannot conclude CALCRIM Nos. 302 and 332 affected the burden of proof. As the People note, we rejected a similar challenge to CALCRIM No. 302 in *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1190–1191.) As our court held in *Ibarra*, CALCRIM No. 302 is impartial. (*Ibarra*, *supra*, at p. 1191.) Contrary to defendant's argument, the instruction "mandates that the jury '*not disregard the testimony of any witness* without a reason or *because of* prejudice or *a desire to favor one side or the other*.'" (*Ibid*., quoting CALCRIM No. 302.) It requires the jury to "'decide what evidence, *if any*, to believe' regardless of which side introduces the evidence, but does *not* tell the jury to disregard the prosecution's burden of proof or to decide the case on the basis of disbelief of defense witnesses or presentation of more compelling evidence by

the prosecution than by the defense." (*Ibid*.) Indeed, neither CALCRIM No. 302 nor 332 tells the jury to decide the case based on which evidence is more convincing by a preponderance of the evidence.

And we do not view these instructions in isolation. Rather, "[i]n assessing a claim of instructional error or ambiguity, we consider the instructions as a whole to determine whether there is a reasonable likelihood the jury was misled." (*People v. Tate* (2010) 49 Cal.4th 635, 696.) """"[W]e must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.' [Citation.]"""" (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 475.) The jury was repeatedly instructed the prosecution bore the burden of proving guilt beyond a reasonable doubt. We presume the jury understood and followed the instructions.

On this record, we cannot conclude the trial court erred in instructing the jury with CALCRIM Nos. 302 and 332.

F. Any Error in Instructing the Jury on Conspiracy to Commit Attempted Murder Was Harmless

In his final contention related to the jury instructions, defendant asserts the court prejudicially erred by instructing the jury on a legally impossible theory—that defendant could be convicted of attempted murder based on a theory that he conspired to commit an attempted implied malice murder. Because we reverse defendant's attempted murder conviction as time-barred, we need not address this additional challenge to count 2.[3]

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[3]While defendant notes, and the People concede, the conspiracy instruction also instructed the jury on a legally impossible conspiracy theory as to count 1—a conspiracy to commit implied malice second degree murder—defendant does not appear to seek reversal of count 1 on this basis. (See *People v. Cortez* (1998) 18 Cal.4th 1223, 1232 ["The mental state required for conviction of *conspiracy* to commit murder necessarily establishes premeditation and deliberation of the target offense of murder—hence all murder conspiracies are conspiracies to commit first degree murder"].) Rather, he acknowledges the jury's finding he personally and intentionally discharged a firearm in conjunction with its guilty verdict as to count 1 "indicates a finding that he fired the shotgun that killed Gonzalez." Thus, any alleged instructional error as to count 1 was harmless because the jury's verdict was based on a legally valid theory—he was a direct perpetrator. (See *In re Martinez* (2017) 3 Cal.5th 1216, 1226 [an instruction on an invalid

IV. The Photographic Lineup Was Not Unduly Suggestive Such That It Was Prejudicial Error to Admit It

Defendant next contends it was error to admit evidence of the photographic lineups shown to Carla (and her related identification of defendant's photograph) because they were unduly suggestive. We cannot conclude the trial court erred.

A. Relevant Procedural History

The day after the shooting, police showed Carla 24 photographs—four lineups of six photographs each. With each lineup, Carla was given a written admonishment that asked her to "Mark the most appropriate box as it pertains to [the] photo line-up." The written admonishments presented Carla the following three options: "1. The person that committed the crime is number ___. [¶] 2. The person who committed the crime looks like number ___. [¶] 3. I am unable to identify anyone in this line-up at this time _____."

Defendant was only featured in one of the four lineups. All the photographs in the lineups were the same size and depicted individuals from the shoulders up, with medium length hair, some with facial hair, others clean-shaven. On the form accompanying the photo lineup featuring defendant's photograph, Carla selected the first option, that the person that committed the crime was the second photograph in the lineup—defendant. Carla indicated she was unable to identify anyone in the other three lineups (option 3).

Before trial, defendant argued the photographic lineup in which Carla identified him as the perpetrator was unduly suggestive. The court noted there were significant age differences between the individuals in the six photographs and "three of them look[ed]

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legal theory may be harmless when "'other aspects of the verdict or the evidence leave no reasonable doubt that the jury made findings necessary'" to find the defendant guilty under an alternative, valid legal theory]; *People v. Chiu* (2014) 59 Cal.4th 155, 167 ["When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground"]; see also *People v. Jackson* (1996) 13 Cal.4th 1164, 1221 ["jury found defendant to be the direct perpetrator, and not mere aider and abettor, by finding that he had personally used the firearm within the meaning of section 12022.5"].)

like kids." The prosecutor responded the individuals were similar in a lot of regards including ethnicity, and he argued Carla knew the shooter and she did not specify to police that the suspect had facial hair so "it wasn't like the officer put somebody in there just with facial hair, left everybody else out." The court held the fact Carla knew defendant "goes a long way to establish reliability of the identification." It denied the objection to the photo lineup as impermissibly suggestive and held the issue "goes to the weight in admissibility."

B. Standard of Review and Applicable Law

> "'The issue of constitutional reliability depends on (1) whether the identification procedure was unduly suggestive and unnecessary [citation]; and if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation [citation]. If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable.' [Citation.] In other words, '[i]f we find that a challenged procedure is not impermissibly suggestive, our inquiry into the due process claim ends.' [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.)

"We independently review 'a trial court's ruling that a pretrial identification procedure was not unduly suggestive.' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 698–699.) Defendant bears the burden of "demonstrating the identification procedure was unduly suggestive." (*Id.* at p. 700; see *People v. Ochoa*, *supra*, 19 Cal.4th at p. 412.)

In evaluating whether a lineup was unduly suggestive, "[t]he question is not whether there were differences between the lineup participants, but 'whether anything caused defendant to "stand out" from the others in a way that would suggest the witness should select him.' [Citation.]" (*People v. Avila*, *supra*, 46 Cal.4th at p. 698.) "[F]or a witness identification procedure to violate the due process clauses, the state must, at the

threshold, improperly suggest something to the witness—i.e., it must, wittingly or unwittingly, initiate an unduly suggestive procedure." (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 413.)

C. Analysis

Defendant argues the photo lineup was "unduly suggestive" because, before the lineup, Carla already believed defendant was one of the masked perpetrators. Accordingly, "[b]ecause she already suspected [defendant] and knew what he looked like, and because his photograph stood out as the only one with a beard and mustache, her selection of his photograph from the photo array was virtually inevitable." Defendant further argues the language on the photo lineup identification form was unduly suggestive "because it suggested that she was required to choose between one of three answers, without the opportunity to explain her selection in her own words." He also contends the lineup was prejudicial because Carla could not identify him at trial as the perpetrator.

We cannot conclude the photographic lineups shown to Carla were unduly suggestive; thus, we find no violation of defendant's due process rights. A photo array is not unduly suggestive merely because there are differences among the individuals shown in the photographs. (See *People v. Blair* (1979) 25 Cal.3d 640, 661 ["'there is no requirement that a defendant in a lineup must be surrounded by people nearly identical in appearance'"]; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 990 [rejecting challenge to photographic lineup where only defendant's photograph had three features noted by eyewitness—glasses, goatee, and suit and tie—but others had glasses and mustache, some had facial hair, and one wore a suit jacket].) Here, in line with Carla's description of the shooter, all the photographs in the lineups featured what appear to be young Asian men. Though defendant had a goatee in his photograph, Carla did not describe the perpetrator as having a beard and/or a mustache. In fact, Detective Pope testified Carla denied that the shooter had a mustache. And there were multiple

photographs in the lineups depicting individuals with different types of facial hair. Thus, there was nothing about defendant's photograph that made it stand out such that it was impermissibly suggestive. (See *People v. Johnson* (1992) 3 Cal.4th 1183, 1217 [minor differences in facial hair among the participants in a photo lineup held not to be suggestive]; *People v. Adams* (1982) 137 Cal.App.3d 346, 353 [photographic lineup not unduly suggestive where "all the participants had different types of facial hair, some with mustaches, some with beards, goatees, etc." such that defendant's facial hair was not suggestive].)

Additionally, our independent review of the lineups does not reveal the photographs in any way suggested "'"the identity of the person suspected by the police."'" (*People v. Avila*, *supra*, 46 Cal.4th at p. 699; see *People v. Ochoa*, *supra*, 19 Cal.4th at p. 413.) Rather, the language on the form preceding each photo lineup admonished Carla in writing that she was "not obligated to identify anyone," "the fact that these photographs [were] being shown to [her] should not influence [her] judgement [*sic*]," and the "photographs may or may not contain a picture of the person who committed the crime now being investigated." The written admonishments further noted, "It is just as important to free innocent persons from suspicion as it is to tell me whether or not you see the person who committed the crime." (See *People v. Avila*, *supra*, at p. 699.) Notably, nothing in the admonishments prohibited Carla from making notes or comments to the police in addition to her selection.

Moreover, the fact Carla was familiar with defendant and directed police to his location before selecting his photograph from the lineups also did not render the lineups unduly suggestive. Rather, Carla's previous familiarity with defendant bolstered the reliability of her identification. (See *People v. Cuevas*, *supra*, 12 Cal.4th at p. 267.)

Accordingly, we cannot conclude the photographic lineups were unduly suggestive such that they violated defendant's due process rights.

We reject defendant's contention.

V. Alleged Prosecutorial Misconduct

Defendant argues the prosecutor committed prejudicial misconduct by arguing Carla would be targeted for testifying. Even if this issue was adequately preserved for our review, we cannot conclude the prosecutor engaged in prejudicial misconduct.

A. Relevant Factual Background

After the prosecutor asked Carla about her familiarity with defendant, he asked Carla about her fear of retaliation:

> "Q. Do you remember a detective from where you're living now contacting you just a little while ago, within the last few years?
>
> "A. Yes.
>
> "Q. Did you remember becoming pretty uncomfortable when you were talking to him about this?
>
> "A. Yes.
>
> "Q. Why was that? Why were you uncomfortable?
>
> "A. I was uncomfortable because I didn't want to know nothing about this case. I didn't want to be involved or anything.
>
> "Q. Why don't you want to be involved?
>
> "A. Because it's something that happened in my past, and I wouldn't—why still live at a place that's still here [*sic*]?
>
> "Q. Are you scared about retaliation?
>
> "A. I'm scared of [*sic*] my life right now.
>
> "Q. Why are you scared of your life?
>
> "A. I'm scared because if he—I don't know if this individual is in some gangs or not. I have a—you know, I don't know if he's going to look for us or anything. Not only myself, but the rest of the witnesses.
>
> "Q. Does that make you scared to say everything you know?
>
> "A. No.

"Q. At some point recently, did you change your phone number?

"A. I had my number for the past ten years, and I changed it, like, six months ago.

"Q. Did you do that so the District Attorney's office here wouldn't contact you?

"A. They knew where I lived. They knew where I worked.

"Q. Did you tell them that you changed your phone number?

"A. No. Like I never told them that I was going to leave out of state.

"Q. After the night of the shooting, did you ever go back to living at the address—

"A. No.

"Q. —at 108 S Street?

"A. No.

"Q. Why not?

"A. I'm not going to go live where there was a crime. And I was staying at that moment at my grandma's house.

"Q. Was it because you knew or believed that they knew you saw it?

"A. Yes.

"Q. And you could have been the only witness?

"A. Maybe.

"Q. Did that make you scared to be there?

"A. Yes."

In his closing, the prosecutor argued Carla readily identified defendant right after the shooting but appeared more hesitant at trial 17 years later. He asked the jury to consider Carla's "identification back then, consider the way she acted back then, and the

things that happened in the meantime—moving out of state, the fear." "They're gone. They move out and she's scared to go back. She's scared to go back because in her mind there was a gang shooting." The prosecutor argued that, in Carla's mind, "there is a target on her head, and it's very difficult to go back there."

> "She talked over and over at length about being scared of retaliation. When asked if she was scared of retaliation, she said, 'Absolutely.' Yes, she was. Very fearful. And it's shown up in her conduct over the years, leaving the state, being reluctant to cooperate."

In rebuttal, the prosecutor countered defense counsel's argument that Carla was seeking to be a "star in a police investigation," arguing:

> "She seems to be the exact opposite, where she saw something she didn't want to see, like most witnesses, but she saw it. And that puts her in a difficult position. And like many witnesses, she's in a very, very difficult position where she is caught between seeing what she saw, wanting to do the right thing, wanting to come forward, wanting to uphold the truth and honor someone who is murdered, and her own safety and her own fear of retaliation and her own fear of being in this place, living in this place, and possibly getting attacks or assaulted. They know she's the only witness. She has a massive target on her head, and they're going to be getting after her."

B. Standard of Review and Applicable Law

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44; see *People v. Mendoza* (2007) 42 Cal.4th 686, 700; *People v. Farnam* (2002) 28 Cal.4th 107, 167.) "The focus of the inquiry is on the effect of the prosecutor's action on the defendant, not on the intent or bad faith of the prosecutor." (*People v. Mendoza*, *supra*, at p. 700.) "'A defendant's conviction will not be reversed for prosecutorial misconduct, however, unless it is

reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.'" (*People v. Tully* (2012) 54 Cal.4th 952, 1010.)

"'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.'" (*People v. Hill* (1998) 17 Cal.4th 800, 820.) An exception is made if a timely objection or request for admonition would have been futile, or if an admonition would not have cured the harm caused by the misconduct. (*Ibid.*) "'The reason for this rule, of course, is that "the trial court should be given an opportunity to correct the abuse and thus, if possible, prevent by suitable instructions the harmful effect upon the minds of the jury."'" (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1341.)

C. Analysis

Defendant argues "[i]t was not misconduct for the prosecutor to argue that Carla did not want to be the star witness and was afraid to testify," but "it was misconduct … for the prosecutor to argue that [Carla's] fears were genuine" in that she had "a massive target on her head and [they] would be coming after her." He asserts such argument relayed facts not in evidence, and a reasonable juror "would interpret the prosecutor's comment" to mean defendant "represented a danger to Carla's life and that she would have to spend her life in hiding unless the jury returned a conviction." Defendant concedes his trial counsel lodged no objection to the prosecutor's conduct he now challenges on appeal, but he contends objections and admonishments would have been futile. The People argue defendant waived his claim of prosecutorial misconduct by failing to object below, and there was no evidence an objection would have been futile. Alternatively, they argue the prosecutor's comment did not amount to prejudicial misconduct. We agree with the People that defendant waived his claim by failing to

object below and he has not established he was prejudiced by the prosecutor's fleeting statement.

First, defendant forfeited his claim by failing to object to the challenged argument on the ground he now raises. (Evid. Code, § 353, subd. (a); *People v. Fuiava* (2012) 53 Cal.4th 622, 687; *People v. Zamudio*, *supra*, 43 Cal.4th at p. 354.) He does not persuade us that an objection would have been futile because the resulting harm from the prosecutor's challenged statement could not be cured. Rather, nothing suggests that a timely admonition, if one had been requested and given, would not have cured any potential harm from the referenced statement.

Irrespective, as defendant concedes, it was permissible for the prosecutor to question Carla about her fear of testifying because such an inquiry related to her credibility. (See *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368–1369 [testimony describing witness's apprehension about testifying is relevant to credibility].) Further, the jury is entitled to know "not just that the witness was afraid, but also, within the limits of Evidence Code section 352, those facts which would enable them to evaluate the witness's fear." (*Id.* at p. 1369.) And, even assuming the testimony had some slight tendency to evoke sympathy, the trial court instructed the jurors several times to disregard any bias, sympathy, prejudice, or public opinion when forming their decision. We presume the jury understood and followed the court's instructions. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 138–139.)

However, to the extent the prosecutor's statements in closing argument—"They know she's the only witness. She has a massive target on her head, and they're going to be getting after her"—overstated the evidence by suggesting Carla's fear of gang retaliation was substantiated, a fact not in evidence, they were improper. (See *People v. Hill*, *supra*, 17 Cal.4th at pp. 827–828 [it is misconduct for prosecutor to refer to facts not in evidence]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 95 ["prosecutor engages in misconduct by misstating facts or referring to facts not in evidence, but he or

she enjoys wide latitude in commenting on the evidence, including urging the jury to make reasonable inferences and deductions therefrom"].) Nevertheless, we cannot conclude defendant was prejudiced by these brief comments in the context of the rest of the prosecutor's closing argument in which he repeatedly stated it was Carla's "belief" she could be a target, as opposed to a matter of fact, and the other evidence of defendant's gang affiliation and Carla's fear of testifying, including evidence she left the state because of her fear of retaliation.

Moreover, the trial court instructed the jury: "Evidence is the sworn testimony of witnesses, the exhibits admitted into evidence and anything else that [the judge] told [them] to consider as evidence" and "Nothing that the attorneys say is evidence. In their … closing arguments, the attorneys discuss the case, but their remarks are not evidence." (CALCRIM No. 222.) We presume the jury followed these instructions. (See *People v. Edwards* (2013) 57 Cal.4th 658, 764 [presuming jury will follow instruction that statements of attorneys are not evidence]; *People v. Bryden* (1998) 63 Cal.App.4th 159, 184 ["Further, the court instructed the jury that questions and statements by the attorneys do not constitute evidence, and the jury is presumed to follow the court's instructions"].) Defendant has provided no basis for this court to find these admonishments did not cure any alleged misconduct. Thus, we cannot conclude the prosecutor's brief statement influenced the verdict such that it amounted to prejudicial misconduct.

We reject defendant's contention.

VI. Admission of Evidence

In multiple, separate arguments, defendant contends the court prejudicially erred in admitting evidence of his gang affiliation, his prior conviction, drug sales by "blue people," and his outstanding misdemeanor warrants. We address and reject each of defendant's contentions in turn.

A. Standard of Review and Applicable Law

Evidence is admissible only if it is relevant. (Evid. Code, § 350.) All relevant evidence is admissible except as otherwise provided by a statutory or constitutional exclusionary rule. (See Cal. Const., art. I, § 28, subd. (f)(2); Evid. Code, § 351.) Relevant evidence is defined as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The general test of relevance "'is whether the evidence tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive.'" (*People v. Bivert* (2011) 52 Cal.4th 96, 116–117.)

A court may exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) A trial court has broad discretion in determining whether evidence is relevant and whether Evidence Code section 352 precludes its admission. (*People v. Mills* (2010) 48 Cal.4th 158, 195; *People v. Williams* (2008) 43 Cal.4th 584, 634.) We review for an abuse of discretion a trial court's rulings on the admissibility of evidence, including those turning on the relevance or probative value of the evidence in question. (See *People v. Lee* (2011) 51 Cal.4th 620, 643; *People v. Hamilton* (2009) 45 Cal.4th 863, 929–930.)

"[S]tate law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*People v. Partida* (2005) 37 Cal.4th 428, 439.) Federal due process is offended only if admission of the irrelevant evidence renders the trial fundamentally unfair. (*Ibid.*)

B. The Court Did Not Err in Admitting Evidence of Defendant's Gang Affiliation

First, defendant argues the court erred in admitting gang-related evidence because it was more prejudicial than probative.

1. Relevant Procedural History

Before trial, the People moved to introduce, and defendant moved to exclude, evidence of his gang affiliation. In their motion, the People explained the victims "were either active members or affiliates of a Los Banos subset of the Norteno criminal street gang," and that Gonzalez was wearing a red sweatshirt and had Norteño tattoos when he was shot and killed.

The court noted defendant's "alleged allegiance is to blue, and the victim was wearing red" and the only evidence of motive "is someone wearing red in blue territory, or blue neighborhood." Defendant argued "the only thing … at the scene that in any way would indicate this might be gang related was the red shirt the victim was wearing." The court stated such evidence may relate to motive and "motive is always a key element in a homicide case."

The court held the gang evidence was admissible because motive is a key relevant issue, and the potential for misuse of the gang evidence by the jury could be addressed by admonitions during jury selection, trial, and instructions. However, it noted, "[t]he strength of the evidence is questionable," and "[t]here's no question that once you interject the gang issue into a case, it creates a whole different set of dynamics as far as [the] trier of fact's attitude towards the case."

2. Applicable Law

In cases not involving a gang enhancement, "evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.]" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) "But evidence of gang membership is often relevant to, and admissible regarding, the charged offense.

Evidence of the defendant's gang affiliation … can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*Ibid*.)

3. Analysis

Defendant argues the court prejudicially erred in denying his request to exclude evidence of his gang affiliation because the theory that Gonzalez was shot for wearing a red shirt was "based on speculation." He further contends the gang-related evidence was "deficient" because there was no indication the killing was gang related. In support, he contends the evidence was insufficient to establish a "deadly red versus blue rivalry between Nortenos and Asian gangs in Merced that would motivate a killing based on clothing color." He also argues the People did not establish defendant "had a personal motive to murder Gonzalez for wearing a red shirt" and that the gang evidence did not help identify defendant as the killer "given that the same possible motive would apply to *all* blue gang members."

We cannot conclude the trial court erred in finding the gang evidence was relevant to motive. Here, multiple witnesses testified Gonzales and Huerta were affiliated with the Norteños, and defendant admitted he claimed membership in the Oriental Troop gang at one time. And, contrary to defendant's contentions, the People introduced evidence of an ongoing rivalry between the gangs that claimed the color blue, such as Oriental Troop, and those that claimed the color red, including Norteños. Indeed, the prosecution's theory of the case was defendant targeted the victims because they appeared to be rival gang members—Norteños—in territory claimed by defendant's gang—Oriental Troop. Thus, evidence of defendant's gang ties and explaining gang colors, behavior, and areas of influence all had a "tendency in reason to prove" (Evid. Code, § 210) defendant had a motive for killing a young male, like Gonzalez, who was wearing red clothing in the location the shooting took place. (See *People v. Williams* (1997) 16 Cal.4th 153, 193–

194 [gang evidence relevant to prove identity and motive where prosecution's theory that victim was targeted for wearing rival gang color in territory claimed by both gangs].) Such evidence did not have to be dispositive of the disputed fact in order to be admissible. (*People v. Richardson* (2008) 43 Cal.4th 959, 1003.)

We further conclude the probative value of the gang evidence was not outweighed by its potential for prejudice. Here, as discussed, such gang-related evidence tended to establish Gonzalez as a member of a gang that was a rival of defendant's gang; thus, it had "more than minimal probative value." (*People v. Williams*, *supra*, 16 Cal.4th at pp. 193–194 [gang evidence had "more than minimal probative value" where it established victim appeared to be member of rival of defendant's gang and no argument such evidence was cumulative]; *People v. Sandoval* (1992) 4 Cal.4th 155, 175 [no error to admit gang membership evidence where it established victims and defendants were members of rival gangs].) Additionally, evidence of defendant's gang affiliation was also relevant to Carla's credibility and her testimony regarding her fear of testifying. (See *People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449-1450 [gang evidence admissible to show basis for witness's fear of testifying].) Given the limited nature of the admitted evidence and the relevance to the charged crimes, we cannot conclude the probative value of such evidence outweighed its potential for prejudice.

Defendant's reliance upon *People v. Albarran* (2007) 149 Cal.App.4th 214 to support a contrary conclusion is misplaced. In *Albarran*, a jury convicted the defendant of attempted murder, shooting at an inhabited dwelling, and three counts of attempted kidnapping, and it found true allegations the charges were committed for the benefit of a criminal street gang. (*Id.* at pp. 219–222.) The trial court granted the defendant's motion for new trial, holding insufficient evidence supported the gang allegations given the lack of evidence linking a gang to the crime. (*Id*. at p. 222.) The court, however, denied the motion for new trial as to the underlying charges, finding the gang evidence was relevant to issues of intent. (*Id*. at p. 222.) The appellate court reversed and held the defendant

was entitled to a new trial on all of the charges because the gang evidence "was so extraordinarily prejudicial and of such little relevance that it raised the distinct potential to sway the jury to convict regardless of Albarran's actual guilt" such that it rendered the defendant's trial "fundamentally unfair." (*Albarran*, at pp. 228, 232.) The *Albarran* court noted "[e]vidence of Albarran's gang involvement, standing alone, was sufficient proof of gang motive"; however, the admission of lengthy, detailed "[e]vidence of threats to kill police officers, descriptions of the criminal activities of other gang members, and reference to the Mexican Mafia had little or no bearing on any other material issue relating to Albarran's guilt on the charged crimes and approached being classified as overkill." (*Albarran*, at p. 228.) The *Albarran* court held, "Given the nature and amount of this gang evidence at issue, the number of witnesses who testified to Albarran's gang affiliations and the role the gang evidence played in the prosecutor's arguments, we are not convinced beyond a reasonable doubt that the error did not contribute to the verdict." (*Id*. at p. 232.)

Unlike in *People v. Albarran*, here the trial court admitted limited evidence regarding defendant's gang affiliation and the presence and relationships of the gangs in the area where the shooting occurred to provide context for the charged crimes. The court did not permit, and the People did not seek to introduce, extensive, graphic evidence of gang activity that was unrelated to the instant offenses. Additionally, as discussed, the gang evidence was relevant to the issue of motive. Defendant admitted he was once a member of the gang Oriental Troop, which claims the color blue, and the People introduced evidence the victims were affiliated with the rival Norteño gang, which claims the color red. Additionally, there was evidence the deceased victim, Gonzalez, was wearing red in rival gang territory. Thus, there was some evidence the shooting was motivated by gang rivalry. *People v. Albarran* is inapposite.

Defendant also contends "[t]he racial aspect of the People's gang-expert presentation was especially prejudicial" in that the People's gang expert "implied that

[defendant] had criminal gang propensities based on his status as an Asian immigrant." We disagree. Unlike the cases defendant cites in support, this was not a case in which there was a gratuitous discussion of race; rather, the referenced testimony gave context to the defendant's gang affiliation, the argument the shooting took place in gang territory, and the alleged gang rivalry. (Cf. *People v. Cudjo* (1993) 6 Cal.4th 585, 626 [finding no compelling justification for prosecutor's reference to defendant's race in closing but no resulting prejudice]; *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345 [gang evidence was irrelevant to charged crimes and prejudicial because it implied criminal disposition]; see generally *Buck v. Davis* (2017) __ U.S. __ [137 S.Ct. 759, 775–777] [holding defense counsel's performance during penalty phase of capital murder trial, in presenting expert testimony that defendant was more likely to act violently in the future because of his race, fell outside bounds of competent representation and resulted in prejudice]; *U.S. v. Vue* (8th Cir. 1994) 13 F.3d 1206, 1212–1213 [testimony regarding likelihood of persons of certain race being involved in opium smuggling was improper and prejudicial].) And, as discussed, the gang evidence here was relevant and offered to prove motive as opposed to defendant's criminal propensity.

Accordingly, we find no abuse of discretion and reject defendant's contention.

C. The Court Did Not Err by Permitting Prosecutor to Ask the Witness About Previous Observations of Defendant

Next, defendant argues the court abused its discretion by allowing the prosecutor to question Carla about her observations of "blue people" selling marijuana.

1. Relevant Factual Background

During the prosecutor's direct examination, the prosecutor asked Carla about her prior familiarity with defendant. The prosecutor asked Carla, "Did you ever see the person you identified as the shooter or anybody else, the blue people, out there selling marijuana or anything else in that area?" The court sustained defense counsel's relevance objection to the question and held a discussion outside of the presence of the jury.

Before the prosecutor proceeded again, the court admonished the jury, "[T]his line of questioning is going to be received for a limited purpose. The limited purpose is to help you assess this witness' evidence—or information regarding the issue of identification only; okay? You cannot consider it for any other purpose." The prosecutor then began:

> "Q. Had you seen the defendant or other people selling marijuana out of 120 S, the address on the corner?
>
> "A. I saw those people selling marijuana, the blue selling marijuana. At their place, I'm not sure. But—
>
> "Q. Where did you see them selling?
>
> "A. In the streets."

2. Analysis

Defendant contends the court abused its discretion in permitting Carla to testify regarding her observations of the "blue people" selling marijuana because such evidence was irrelevant in that it had no tendency in reason to identify defendant as the gunman. We find no abuse of discretion.

The referenced line of questioning related to Carla's previous familiarity with defendant, which was relevant to the credibility of her identification. (See *People v. Cuevas, supra*, 12 Cal.4th at p. 267 [evidence of witness's prior familiarity with defendant bolsters reliability of identification].) Thus, the inquiry was directly relevant to a material fact issue in the case—the perpetrator's identity. Accordingly, we cannot conclude the trial court abused its broad discretion in allowing this line of questioning. (See *People v. Beamon* (1973) 8 Cal.3d 625, 632 ["The identification, essential to the People's case, is materially buttressed by evidence that the victim was familiar with and able to recognize defendant because of observations made at a time prior to the [instant offenses]. Evidence of the circumstances which made it possible for the victim to

identify defendant, although it disclosed a prior [crime], was thus relevant to establish the credibility of the identification"].)

Defendant argues the court's limiting instruction "told jurors that marijuana sales by unknown Asian 'blue people' could be considered as evidence that identifies [defendant] as the perpetrator." However, the clear language of the court's limiting instruction admonished the jury to only consider such evidence for purposes of assessing Carla's identification and not to consider it for any other purpose. We presume the jury understood and followed the instruction as stated and that the instruction effectively minimized any prejudicial effect of the evidence. (See *People v. Panah* (2005) 35 Cal.4th 395, 453; see also *People v. Waidla* (2000) 22 Cal.4th 690, 725 ["The presumption is that limiting instructions are followed by the jury"].) That presumption is not rebutted here. For the same reason, we cannot conclude the instruction led to an "irrational permissive inference," as defendant contends. It did not call for the jury to infer anything, let alone that defendant was the shooter, but rather to use such evidence in evaluating the reliability of Carla's identification. Additionally, because we presume the jury followed the limiting instruction, to the extent the referenced inquiry into marijuana sales by other people was irrelevant to assess Carla's identification, we presume the jury disregarded it; thus, we cannot conclude defendant was prejudiced by its inclusion.

We reject defendant's contention.

D. The Court Did Not Prejudicially Err in Permitting the Prosecutor to Question Defendant Regarding His Prior Conviction

Defendant also challenges the admissibility of evidence of and reference to his prior conviction.

1. Relevant Procedural History

Before trial, defendant moved in limine to exclude evidence of his prior conviction for a 1995 violation of section 496. In response to defense counsel's inquiry as to whether the People planned to introduce the conviction, the prosecutor stated, "Probably

not. No." The court asked the prosecutor if he planned to use the conviction if defendant testified and the prosecutor again said, "No." Accordingly, the court pronounced: "Okay. So, [defendant], there will be no evidence of any prior felony convictions, or any criminal convictions."

During his cross-examination of defendant, the prosecutor asked defendant whether he previously committed a crime with Lo Saetern and Lekxai Soulanone. Defense counsel objected on foundational grounds and argued the question was inappropriate because defendant never denied getting in trouble with Lekxai. The prosecutor argued the question was relevant to establish a "prior association" between defendant and Lekxai. He explained, "it's evidence that they were involved in criminal activity before, evidence they were involved in gangs before." He argued the "connection" was "significant to this case" in that "[t]hey're together before the shooting … [t]hey're together after the shooting. … [I]t's the prosecution's theory that either Lo or Lekxai somehow conspired with the defendant and tipped the defendant off, and that's how the defendant knew where to go to shoot these people."

The court noted the prior offense occurred "six years before the current offense," so "there's a remoteness issue." But it agreed with the prosecutor that evidence of defendant's prior criminal activity with someone who is potentially a coconspirator in this case and a possible fellow gang member is relevant. After weighing the arguments and confirming the evidence was offered for the limited purpose of showing that at some point in time defendant was willing to engage in criminal conduct with Lekxai Soulanone, the court admitted evidence of defendant's prior conviction. Then, the prosecutor asked defendant about the prior conviction:

> "Q. So, sir, back in that case in '95, there's a different Lo Saturn [*sic*]?
>
> "A. Yes.

"Q. But Lekxai Soulanone was involved in that case with you; correct?

"A. Yes.

"Q. Okay. So you and him committed a crime together back in 1995; is that correct?

"A. Well, I said I did not commit the crime, but I was there.

"Q. Okay. But you were convicted of having a stolen car in that case; right?

"A. Right."

2. Applicable Law

Subject to the trial court's discretion under Evidence Code section 352, prior felony convictions that necessarily involve moral turpitude may be used to impeach a witness in a criminal proceeding. (See *People v. Castro* (1985) 38 Cal.3d 301, 317.) Receiving stolen property necessarily involves moral turpitude. (*People v. Rodriguez* (1986) 177 Cal.App.3d 174, 178–179.)

Section 352 of the Evidence Code affords the trial court discretion to exclude evidence if its probative value is "substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "[T]he court's exercise of discretion will not be disturbed on appeal except upon a showing that it was exercised in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1233.)

3. Analysis

Defendant argues the prosecutor violated the in limine ruling by questioning defendant regarding his prior conviction and the trial court erred in admitting evidence of this conviction because it was remote in time and used to establish criminal propensity,

an improper purpose.[4] The People assert evidence of defendant's prior conviction was properly admitted because it "occurred only five years before the instant crime, involved a crime of moral turpitude, and [defendant's] cousin Lekxai was also involved in the prior offense." They argue "[t]hese circumstances were relevant to the prosecutor's theory that Lekxai had served as a 'look-out' during the crime because they tended to show that [defendant] and Lekxai had engaged in criminal activity together on a prior occasion" and that "any error in the court's ruling was harmless."

Here, defendant's prior conviction for receiving stolen property in violation of section 496, subdivision (a) involved moral turpitude and was thus admissible for impeachment purposes and probative regarding defendant's veracity unless its probative value was "substantially outweighed" by the probability that its admission would necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (See Evid. Code, § 352; *People v. Rodriguez*, *supra*, 177 Cal.App.3d at pp. 178–179.) In *People v. Tran* (2011) 51 Cal.4th 1040, our state Supreme Court identified factors that "might serve to increase or decrease the probative value or the prejudicial effect of evidence of uncharged misconduct and thus are relevant to the weighing process required by Evidence Code section 352." (*Id.* at

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[4]To the extent defendant argues the prosecutor committed misconduct by referencing defendant's prior conviction in violation of the in limine ruling, his counsel did not object on that basis; thus this argument is waived on appeal. (See *People v. Hill*, *supra*, 17 Cal.4th at p. 820.) Additionally, the court was entitled to reconsider its in limine ruling in light of the facts presented at trial. (See *People v. Jennings* (1988) 46 Cal.3d 963, 975, fn. 3 [party should renew in limine motion during trial because "until the evidence is actually offered, and the court is aware of its relevance in context, its probative value, and its potential for prejudice, matters related to the state of the evidence at the time an objection is made, the court cannot intelligently rule on admissibility"]; see also *People v. Turner* (1990) 50 Cal.3d 668, 708 [in limine rulings are "subject to reconsideration upon full information at trial"]; *People v. Yarbrough* (1991) 227 Cal.App.3d 1650, 1655 ["*in limine* rulings are not binding because the trial court has the power to reconsider, modify or set aside its order at any time prior to the submission of the cause"].) Furthermore, as we discuss *post*, we cannot conclude the court erred in admitting defendant's prior conviction and, irrespective, the reference to defendant's prior conviction was harmless.

p. 1047.) It held the probative value of uncharged misconduct is greater when the evidence emanates from an independent source and when the uncharged acts (i.e. the prior conduct) resulted in a conviction. (*Ibid.*) Such evidence is more prejudicial when the prior acts did not result in convictions because it could cause jurors to be confused and to punish the defendant for those acts rather than for the current offense. (*Ibid*.) "The potential for prejudice is decreased, however, when testimony describing the defendant's uncharged acts is no stronger or more inflammatory than the testimony concerning the charged offense." (*Ibid.*)

We cannot conclude the trial court erred in admitting evidence of defendant's prior conviction after weighing its probative value against its potential for prejudice. The uncharged act resulted in a criminal conviction, and the limited evidence admitted was "no stronger or more inflammatory" than the evidence of the charged offenses, which included a murder charge. (*People v. Tran, supra,* 51 Cal.4th at p. 1047.) Additionally, such evidence was probative of defendant's veracity and, as the People argue, it provided some evidence of defendant's prior relationship with Lekxai. While the prior conviction occurred many years before trial, it only occurred five years before the shooting giving rise to the instant charges. On this record, we cannot conclude the court abused its broad discretion by determining that the potential prejudicial effect of defendant's prior conviction did not substantially outweigh the evidence's probative value.

Defendant relies on *People v. Felix* (1993) 14 Cal.App.4th 997 to argue such evidence was inadmissible under Evidence Code section 1101, subdivision (b) to establish identity. (*People v. Felix, supra,* at pp. 1004–1005.) In *Felix,* the defendant and his codefendant were charged with robbery. (*Id*. at pp. 1000–1002.) The *Felix* court held the trial court erred in admitting evidence of the defendant's prior robbery conviction, committed with the same codefendant, because it could be used as improper character evidence. (*Id*. at pp. 1004–1005.) It held "[t]he fact that both crimes were committed by two men is grossly insufficient as a criminal signature" for such evidence to be

admissible to prove identity under Evidence Code section 1101, subdivision (b). (*Felix*, at p. 1005.) It noted, though such evidence was relevant to show prior acquaintance, its probative value was minimal, particularly given defense counsel's offer to stipulate to the defendants' prior acquaintance. (*Id*. at p. 1006.) The *Felix* court held "[t]he potential for improper and prejudicial impact, in contrast, was strong and clear"; the jury was told only "one salient fact about these defendants: they were admitted robbers. The danger the jury would reason, 'if they did it once, they probably did it again' was too great to justify admission of a prior conviction so weakly probative of identity or any other disputed issue." (*Id*. at pp. 1006–1007.)

However, the defendant in *Felix* did not testify, as defendant did here, such that evidence of his prior convictions would be deemed admissible impeachment evidence if admissible under Evidence Code section 352. (*People v. Felix*, *supra*, 14 Cal.App.4th at p. 1006.) More importantly, unlike in *Felix*, we cannot conclude defendant was prejudiced by admission of his prior conviction. (*Ibid*.) Given the dissimilarity between defendant's prior conviction for receipt of stolen property and the charged crimes, we cannot conclude, as was the case in *Felix*, that its admission was overly prejudicial and likely to be used by the jury to establish defendant's propensity to commit the charged crimes. Moreover, the discussion of the prior conviction was limited to a few questions that did not reveal significant details of the underlying offense. And the receipt of stolen property conviction was less inflammatory than the charged crimes. The prosecutor also did not focus on the prior conviction or argue it should be used by the jury to establish defendant's propensity to commit the charged offenses. Additionally, the jury was instructed, "If you find that a witness has been convicted of a felony, you may consider that fact only in evaluating the credibility of the witness's testimony. The fact of a conviction does not necessarily destroy or impair a witness's credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable." We presume it followed this limiting instruction. Thus, we cannot conclude there is a

reasonable probability the outcome of the trial would have been different if the court had excluded evidence of defendant's prior conviction.

Accordingly, we reject defendant's contention.

E. The Court Did Not Abuse Its Discretion by Admitting Evidence of Defendant's Statement Regarding His Outstanding Misdemeanor Warrants

Defendant next contends the court erred by permitting the prosecutor to question him regarding his outstanding misdemeanor warrants following the shooting.

1. Relevant Procedural History

Before trial, the court granted defendant's motion in limine providing "any evidence [defendant] had any outstanding misdemeanor warrants on … March 26th, 2000 [is] excluded."

During trial, at the end of defendant's direct examination, he testified he was honest when he spoke to the officers in this case. Then, on cross-examination, the prosecutor asked defendant whether he lied to the police about his name when they first showed up. Defendant denied lying to the police or giving them a false name.

Outside of the jury's presence, the prosecutor explained Detective Pope's report stated defendant denied he had warrants out of Fresno County when approached by police, but he eventually admitted, "'All right. That's me.'" The court noted "[t]hat has to do with credibility, the issue of whether he told the officer the truth," "[i]t's proper." Accordingly, the court held such evidence was admissible for the "limited purpose to assess defendant's credibility."

On redirect, defendant again affirmed he spoke truthfully to the police. On recross, the prosecutor questioned defendant about his exchange with the police regarding his outstanding warrants.

> "Q. At the time in—the police came on March the 27th and found you, they said that you had warrants; is that correct?

"A. Yes.

"Q. You told them no, that wasn't you, that wasn't you.

"A. Well, at first I thought they come—they're going to come arrest me for the shooting. That's why I denied, that they got the wrong person. But I didn't know that I have a warrant or anything.

"Q. But they told you that, 'You have warrants.' [¶] And you said, 'No. That's not me. You got the wrong person.'

"A. That was, like, mistaking of questioning, I think. I thought they were coming arrest me for something, of that shooting, for the shooting, but I didn't know that they come arrest me for the warrants.

"Q. Why did you think they were—they were coming to arrest you for the shooting?

"A. Because they have no reason to go in there if they don't have a warrant.

"Q. But they said you had, well, warrants out of another county; right?

"A. Yes.

"Q. Okay. And you denied that that was you. You said it was—they had the wrong person. Those weren't your warrants.

"A. If I said so, I believe that's what I said."

The court then admonished the jury: "[T]his last subject matter is received for a very limited purpose, to assess [defendant's] credibility. It cannot be considered for any other purpose. It's limited to assessing his believability, and that issue alone." On redirect, defense counsel asked defendant if he later told police, "'Oh yeah. Those are my misdemeanor warrants out of Fresno.'" Defendant did not recall saying that but reported he would agree if it said he did in the transcript. The court then interjected and stated, "That's not proper subject matter."

In rebuttal, the prosecutor recalled Detective Pope. Pope testified, on March 27, 2000, he asked defendant if he had outstanding misdemeanor warrants when he

encountered him, and defendant denied he did. Eventually, however, defendant admitted "that he was the person on those warrants."

2. Applicable Law

Where, as here, "a defendant voluntarily testifies, the district attorney may fully amplify his testimony by inquiring into the facts and circumstances surrounding his assertions, or by introducing evidence through cross-examination which explains or refutes his statements or the inferences which may necessarily be drawn from them." (*People v. Cooper* (1991) 53 Cal.3d 771, 822.) A defendant who elects to testify on his own behalf is not entitled to a false aura of credibility. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1056.) "Although a defendant cannot be compelled to be a witness against himself, if he takes the stand and makes a general denial of the crime with which he is charged, the permissible scope of cross-examination is 'very wide.' [Citation.]" (*People v. Cooper*, *supra*, at p. 822.) As a result, a testifying defendant may be properly impeached with a statement made by him that is inconsistent with any part of his testimony. (Evid. Code, §§ 780, 1101, subd. (c).)

3. Analysis

Defendant asserts the court erred by permitting the prosecutor to question him about whether he had outstanding misdemeanor warrants. He contends the ruling "permitted remote collateral impeachment on an irrelevant topic," and "[e]ven if he did lie to the officer …, a trivial lie … does not involve evil or moral turpitude." He argues the court "compounded the error" with its limiting instruction that "suggested that the court did not believe [defendant's] explanation and that jurors could use it against him in assessing the credibility of his trial testimony." Assuming this issue was adequately preserved for our review, we find no abuse of discretion.

"[D]efendant put his own veracity at issue" by choosing to testify. (*People v. Collins* (2010) 49 Cal.4th 175, 206.) He opened the door to the challenged evidence

when he testified on direct that he was truthful when he spoke to police. The subsequent evidence established defendant initially denied, but later admitted to police, he had outstanding warrants, contradicting his statement on direct examination that he was truthful when he spoke to the police. Accordingly, it was relevant to impeach his credibility. (See Evid. Code, § 780, subd. (i) [trial court may admit otherwise inadmissible evidence for impeachment purposes to prove or disprove the "existence or nonexistence of any fact" about which a witness has testified or opened the door]; *People v. Dykes* (2009) 46 Cal.4th 731, 764 ["When a defendant chooses to testify concerning the charged crimes, the prosecutor can probe the testimony in detail and the scope of cross-examination is very broad"].) Accordingly, we cannot conclude the trial court abused its discretion by permitting the prosecutor to pursue this line of questioning.

Defendant argues "[t]he fact that [he] had misdemeanor warrants was irrelevant to his credibility." However, the jury was called to focus on defendant's denial that he had outstanding warrants, rather than the existence of the misdemeanor warrants. As discussed, to the extent the challenged testimony supported a conclusion he was untruthful to police, in contradiction of his testimony on direct, it was relevant to his credibility. (See *Andrews v. City and County of San Francisco* (1988) 205 Cal.App.3d 938, 946 ["a witness who makes a sweeping statement on direct or cross-examination may open the door to use of otherwise inadmissible evidence of prior misconduct for the purpose of contradicting such testimony"].) Thus, the trial court did not abuse its discretion in admitting it.

Additionally, the court admonished the jury that such evidence was admitted for a limited purpose—to assess defendant's credibility. Contrary to defendant's assertions, the limiting instruction in no way signaled to the jury what evidence to accept as true. We presume the jury understood and followed the instruction as stated, and that the instruction effectively minimized any prejudicial effect of the evidence. (See *People v.*

Panah, *supra*, 35 Cal.4th at p. 453; see also *People v. Waidla*, *supra*, 22 Cal.4th at p. 725 ["The presumption is that limiting instructions are followed by the jury"].)

We reject defendant's contention.

VII. Cumulative Error

Defendant argues the errors committed were cumulatively prejudicial and deprived him of a fair trial. We disagree.

> "Under the 'cumulative error' doctrine, we reverse the judgment if there is a 'reasonable possibility' that the jury would have reached a result more favorable to defendant absent a combination of errors. (See *People v. Williams* (2009) 170 Cal.App.4th 587, 646; *In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32 ['Under the "cumulative error" doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial.'].) 'The "litmus test" for cumulative error "is whether defendant received due process and a fair trial."' (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)" (*People v. Poletti* (2015) 240 Cal.App.4th 1191, 1216–1217.)

Here, there is no series of prejudicial errors to cumulate. Accordingly, defendant cannot demonstrate the cumulative effect of the alleged errors resulted in prejudice. (See *In re Reno* (2012) 55 Cal.4th 428, 483 ["As noted, claims previously rejected on their substantive merits—i.e., this court found no legal error—cannot logically be used to support a cumulative error claim because we have already found there was no error to cumulate"].)

VIII. Abstract of Judgment

In his final argument, defendant contends the abstract of judgment should be amended because it erroneously states he received a consecutive term for count 3. Because we reverse defendant's attempted murder (count 2) and felon in possession of a firearm (count 3) convictions, defendant's final point is moot. Moreover, after the completion of briefing, defendant submitted a supplemental clerk's record containing an amended abstract correcting the error he has raised here.

DISPOSITION

Defendant's convictions for attempted murder (count 2) and unlawful possession of a firearm (count 3) are reversed, and the matter is remanded for resentencing. In all other respects, the judgment is affirmed.

_____
PEÑA, J.

WE CONCUR:

_____
LEVY, Acting P.J.

_____
FRANSON, J.